No. 10989.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY TO PETITION FOR REHEARING.

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Preliminary.

Petitioner has filed his Petition for Rehearing after affirmance of the judgment against him and has augmented the petition by a Supplement to Petition for Rehearing wherein he raises a new point. By direction of the Court, Appellee submits this, its reply to the said petition.

I.

Defendant Has Not Been Denied Due Process of Law Under the Fifth and Sixth Amendments to the Constitution of the United States.

A. The Indictment Was Procured by Due Process of Law.

Appellant complains that the indictment was procured solely on hearsay evidence as reflected by the record. The record does not substantiate this claim. The point is based upon speculation and conjecture. A reading of the record does not disclose the text of the proceedings before

the Grand Jury. It does not disclose any effort to reach the text of the proceedings before the Grand Jury. Appellant bases his appeal on this point on his Assignment of Error No. 5 [R. 177]. It appears from a reading thereof that counsel for Appellant had developed in the course of his cross-examination of Mr. Mainland and Miss Skinner that they had appeared before the Grand Jury and that as their testimony in Court fell within his definition of hearsay, he inferred that they had given testimony of the same character before the Grand Jury. Appellant's attack must fail because there is no showing as to what evidence the Grand Jury acted upon. It must be assumed that the Court followed the well established rule that the evidence taken before the Grand Jury is confidential matter to which the accused has no right of access. *Goodman v. United States,* 108 F. (2d) 516, at 519 (C. C. A. 9, 1939).

There was no motion to quash the indictment until the close of the Government's evidence. It is elementary that such a motion cannot be entertained unless it is made before the jury is sworn to try the case. *Sherman v. United States,* 80 F. (2d) 629 (C. C. A. 4, 1935).

It is also well established that a motion to quash the indictment is addressed to the discretion of the trial court and is not subject to review. *Bowles v. United States,* 73 F. (2d) 772 (C. C. A. 4, 1934). Furthermore, the testimony of the witnesses Mainland and Skinner as given at the trial was not hearsay. The Record does not disclose and no record could properly disclose what they testified to in the Grand Jury room. Mainland was the Government investigator who testified at the trial to the taking of a statement from Appellant. Said testimony at the trial

amounted to a recitation of admissions made by Appellant to the witness. The witness Skinner was a victim of the conspiracy and of the substantive offense described in Count 11. She testified at the trial to representations made to her by fellow conspirators of Appellant. What she testified to in the Grand Jury room is undisclosed. Even if she gave the same evidence to the Grand Jurors, it was proper evidence to be received in a conspiracy case under the well established rule that the acts and declarations of a conspirator when made in aid of the conspiracy and during the time the conspiracy was active, are binding upon all conspirators. *United States v. Manton,* 107 F. (2d) 834 (C. C. A. 2d, 1938); *Marino v. United States,* 91 F. (2d) 691 (C. C. A. 9, 1937); *Rose v. United States,* 149 F. (2d) 755 (C. C. A. 9th, 1945); *Jung Quey v. United States,* 222 Fed. 766 (C. C. A. 9, 1915).

B. Defendant Has Not Been Denied His Right to an Early Trial.

Appellant in this Petition for Rehearing alleges that no attempt had been made to arraign him for a period of approximately three years after the filing of the indictment, and that the Government failed to give him an early trial. The Constitutional right which defendant asserts has been infringed is not a right to have a case dismissed or reviewed. The right is very definitely, clearly and narrowly stated in the Constitutional Amendment itself to be a right to a speedy trial. Appellant's attack is entirely aside from the basis upon which he seeks to give it validity. He does not claim that he ever asked for an early trial or a trial at any time. He simply complains that he was tried at all. In a footnote to the Court's Opinion, reference was made to the fact that the Government did not

proceed to trial shortly after the return of the indictment because defendant Carter (Warren) was not apprehended until October, 1944, and two other defendants, John J. L. Callahan and W. W. Wright, never were apprehended. This is a practical explanation for delay. Petitioner asserts that there is not a scintilla of matter in the Record to reflect that Callahan and Wright were connected with any transaction involved in the case. That challenge is empty of any meaning in considering Appellant's present plea because it must be apparent that inasmuch as Callahan and Wright were never tried, it would have been an unnecessary, vain and delaying practice for the Government to have introduced evidence connecting them with the crime. It was Appellant and the two corporations dominated by him who were on trial and not Callahan or Wright. There is no answer to the fact that defendant Carter (Warren) was not apprehended until October, 1944, and that Appellant Danziger was arraigned exactly one month later. The first thing that he did within the record thereafter was to ask for a continuance which was granted him. Appellant and Carter (Warren) were brought to trial approximately three years after the filing of the indictment, and about three months after Carter was apprehended. At the outset of the trial Carter (Warren) withdrew from the trial by the entry of his plea of guilty [R. 77]. However, it is the uniform statement of the cases upon the subject that a defendant who claims that his right to a speedy trial has been infringed must have demanded a trial. Appellant here is making his

argument without existence of that foundation. Among the cases which treat of this subject is *Phillips v. United States,* 201 Fed. 259 (C. C. A. 8, 1912). The Court said:

> "Counsel for Phillips also moved the court to dismiss the case and discharge the defendant, because the United States had failed to bring him to trial at an earlier date. This motion was also overruled. The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to a speedy and public trial; but the record does not show that Phillips ever asked for a trial during the four years that the indictment was pending, and we do not think a defendant can acquiesce to the postponement of his trial, and then, when the same is called, move that the case be dismissed because he had not been given a speedy trial. It is his duty, if he wants a speedy trial, to ask for it; and we must presume that he would have been granted an earlier trial if he had so asked. There was no error in the ruling of the court in this respect."

The language of this opinion indicates that there is a presumption that an earlier trial would have been granted had Appellant requested it. The Record is devoid of any indication of such a request by the Appellant now before this Court. See also, *Poffenbarger v. United States,* 20 F. (2d) 42 (C. C. A. 8, 1927):

> "It is urged that the defendant has not been given a speedy trial, to which he is entitled under the Constitution of the United States. The record indicates that the defendant was indicted while in prison and was not brought to trial until after his release from the federal penitentiary. The record does not show

> a demand for a trial on the part of plaintiff in error, or that any resistance was made by plaintiff in error to a continuance of the case, or that anything was done upon his part to secure a speedy trial. It is our view that the defendant acquiesced in the postponement of his trial by not asking for a speedy trial. This court said in *Phillips v. United States*, 201 F. 259, 262: 'We must presume that he (defendant) would have been granted an earlier trial if he had so asked.' "

In *Worthington v. United States,* 1 F. (2d) 154 (C. C. A. 7, 1924), cert. den. 266 U. S. 626, the convicted defendant was not brought to trial until eight years after the return of the indictment. The convicted defendant made a motion to dismiss the case because of the delay. The Government demurred to the motion. The demurrer was sustained and the motion denied.

> "The principal assignment of error is the ruling of the court in refusing to dismiss the defendants upon their plea, and sustaining plaintiff's demurrer thereto. The record fails to show a single effort made by defendant, or any other defendant, to avail himself of a speedy trial. No facts were pleaded bringing the case within the rule requiring a speedy trial; *i. e.*, that the defendant was incarcerated, or, being enlarged, had appeared in open court demanding trial, or otherwise. Defendant's sole reliance was upon the bare fact that the case had not been prosecuted. If the defendant desired a speedy trial, it was his duty to ask for it, and we must assume that it would have been granted, had he made any effort to procure it. His long and uninterrupted acquiescence in the delay bars his right to complain."

See *Pietch v. United States,* 110 F. (2d) 817 (C. C. A. 10, 1940):

> "The contention is made that it was prejudicial to the rights of appellant to be tried more than seven years after the termination of the transactions on which the indictment was predicated. The indictment was returned before limitation had run. The United States Attorney stated in person and by letter to counsel for some of the accused that he did not intend to try the case, and that it was his purpose to dismiss it. But appellant never made demand for trial. He did not object or protest to the court respecting the delay. He filed a motion to dismiss the indictment on account of the delay, but the motion was filed more than three years after the return of the indictment, and it was a motion to dismiss—not a demand for trial. A person charged with a crime cannot assert with success that his right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States has been invaded unless he asked for a trial. In the absence of an affirmative request or demand for trial made to the court it must be presumed that appellant acquiesced in the delay and therefore cannot complain."

The case of *United States ex rel. Whitaker v. Henning,* 15 F. (2d) 760 (C. C. A. 9, 1926), upon which Appellant relies, when read in entirety does not lend any weight to Appellant's claim. In that case, the Appellant was a convict serving a prison sentence. While so confined he moved the District Court to dismiss the then pending indictment against him or to set the case for trial. The Court set the cause for trial but did not proceed with the trial because the defendant was absent by virtue of his

confinement in a distant prison. Upon noting that the defendant would shortly be released from imprisonment and could, therefore, present himself for trial within a very brief period of time from the date of the decision, the Circuit Court denied his petition for a writ of mandamus.

It appears from the language of the foregoing cases that the right to a speedy trial is a right that must be asserted by a defendant and that in the absence of such assertion by a demand for trial, he waives the right. The right is not treated in the Sixth Amendment to the Consfitution to the United States as a right to dismissal but as a right to trial. Whether there was a speedy trial or not, Appellant in this case had a trial although he never requested one and he had it without effort on his part to bring the case to trial.

C. Appellant's Assertion That He Was Compelled to Waive His Right to Trial by Jury Is Untrue.

The only treatment of the contention in his Petition for Rehearing that he was compelled to waive trial by jury is the statement that the possibility of a recess during the trial so that Appellant could take depositions induced Appellant to waive trial by jury. It makes no difference to a court what might motivate a defendant to waive trial by jury provided, of course, that the waiver is knowingly and understandingly made and is not made under misrepresentation or by reason of force. However, if Appellant did waive trial by jury for the reason now asserted in his Petition for Rehearing, he kept it secret from the Court for his counsel stated:

> "I want Your Honor to know, as I indicated to opposing counsel, if we were required to go to trial,

everybody would fare better by having the case, of the complexities involved herein, tried by Your Honor without a jury."

See also Record 392:

"Mr. Lucas: I think we should at this time, if we are going to proceed without the jury, have the waiver of the jury properly signed by all concerned, if the court please.

The Court: Let me make it plain it makes no difference to me whether the trial is with or without a jury.

Mr. Lucas: I think counsel wanted to proceed without a jury. I am perfectly willing to proceed without a jury, and it is entirely up to the defendant. I want to get the government on record in that regard.

Mr. Rose: I made it clear, Your Honor, we have agreed to try this case, if we are obliged to try it, without a jury. I don't think I want to supplement that by repeating what I have said before.

Mr. Lucas: You used the word 'obliged,' Mr. Rose.

Mr. Rose: I have already gone on record as waiving trial by jury."

Record 394:

"Mr. Rose: The only difficulty I find here, Your Honor, is waiving by the corporate defendants.

The Court: I understand. Is there a local rule on it? Mr. Rose, you sign and have Mr. Danziger sign, and I will accept your oral statement as to the corporate defendants.

Mr. Rose: Very well, Your Honor."

D. Appointment of Appellant's Attorney to Represent the Corporate Defendants Did Not Prejudice Appellant.

Appellant urges strenuously but not very clearly that there was some error in the Court's appointment of Mr. Rose to represent the corporate defendants. There is no explanation as to wherein Appellant was prejudiced. There was a peculiar identity of interest in the three defendants on trial. Trinidad International Petroleum, Ltd. was a corporation which the evidence discloses was dominated and controlled by Appellant and he was at all times either its President or Chairman of its Board. [See Exhibt 92.] Wake Development Company was a private holding corporation controlled and solely owned by Appellant's wife except for a period of time when it was owned by another relative. [Exhibit 92.] There was no assertion at the time of the appointment that there was a conflict between the interests of these parties. The Court did not force Mr. Rose upon the Appellant. Appellant had already retained Mr. Rose. The Court appointed that attorney to represent the two corporations. It is strikingly inconsistent for this attorney now to appear before the Court, after having won reversal of the judgment of convictions against the two corporations for whom he was appointed and for whom he appeared not only at the trial but in the handling of the appeal, and assert that there was any real dissatisfaction or that representation of these three closely allied defendants was inconsistent.

The Court was very clear in its appointment of Mr. Rose to represent corporate defendants that the appointment was expressly made subject to the development during the trial.

Record 388:

> "Mr. Rose, I will appoint you to act as attorney for the corporate defendants subject to developments at the trial that may cause you to feel that your interest has become adverse."

From that point on to the close of the trial and through proceedings on imposition of sentence there was no intimation that the interests of the corporate defendants and appellant Danziger were in any way adverse. Exhibit 92 is a transcript of testimony given by appellant Danziger before the Securities and Exchange Commission. It discloses a very close relationship between Danziger and Trinidad. He testified in the exhibit that he was President or Chairman of the Board at all pertinent times and that he had managed the affairs of the corporation ever since its formation. In the same exhibit, he testified that Wake Development Company was a personal holding company in which his wife was a beneficial owner except during a period of time when Alda Faulkner, a relative and right-hand in his office, was the beneficial owner.

In the *Glasser* case, 315 U. S. 60, relied upon by Appellant, there is a considerable variance from the facts of the case before this Court. The attorney appointed in that case informed the Court that the defendant did not wish to be represented by him. In colloquy between court and counsel it was pointed out that there was a divergency of interests. There was an opposition from the client whose attorney was appointed to represent another defendant. After considerable representation to the court that everyone was dissatisfied, the Court stated to defendant Kretske that if he was not satisfied he would have to hire another lawyer and that the Court would proceed forthwith with

the selection of a jury. Appellant has not indicated a single instance which occurred at the trial wherein he was prejudiced by the fact that counsel of his own selection was delegated to represent other defendants which, although they were separate defendants, were corporations dominated and controlled by the individual appellant. Appellant was sufficiently satisfied with Mr. Rose's case management to continue him as counsel after all other appellants have been eliminated.

E. The Court Did Not Err in Denying Appellant's Motion for a Continuance.

The Record does not contain any clearly defined motion for a continuance. In his pleading entitled "Motion to Dismiss Indictment for Want of Prosecution, etc." [R. 68] Appellant does not include a motion for continuance (nor does he demand trial) but contents himself with a motion to quash basing that motion entirely upon want of prosecution. In support of the motion there appears, at page 69, an affidavit of Appellant wherein there is recited the fact of the delay in bringing him to trial; some reference to allegations in the indictment; and an allegation that persons who would be in a position to establish that Appellant's actions had been *bona fide* and lawful were at the time of the making of the affidavit in places involved in the war. There is no representation by affidavit or otherwise as to exactly what these persons would have testified to, nor as to their identity nor as to where they were located. For all that appears in the Record, they might have been located at places involved in the war but still accessible for purposes of deposition. The recitations of the affidavit do not touch upon this subject and in contenting himself with the recitation that unidentified per-

sons existed in unrevealed places could exculpate him by testimony, the nature of which was not recited, Appellant left the matter before the Court in such an uncertain state of the Record that a court cannot properly be accused of an abuse of discretion in denying a continuance. If there is any motion for continuance in the Record or any affidavit in support thereof, Appellee has failed to discover it. It does appear that there was a pre-trial conference of some kind [R. 76] and that at that conference it was ordered that the trial date of January 16, 1945 stand. It appears that there was a court reporter present who reported the proceedings [R. 76]. Appellant, however, has not caused the record of those proceedings to be transcribed and made a part of the Record in his appeal. When the case was called for trial [R. 378] Appellant did not make any motion for continuance. There was considerable colloquy between court and counsel concerning the corporate defendants, who are no longer before this Court, having prevailed in their appeal. At page 383 of the Record the Court indicated a disposition to proceed with the trial of the case as follows:

> "I am quite sure I shall ask you to go to trial, Mr. Rose, with the mental reservation I stated, should it develop at this trial that the interests of your client have been seriously affected by the recent arraignment, and time was not thus allowed for taking important testimony, important to your defense, by deposition, and the other things that are necessary to show diligence and the like under the authorities. It seems to me only the trial could develop that. It is the kind of a thing that can't be passed on in advance." [R. 385.]

It is an elementary principle of law that granting or refusing a request for a continuance rests within the sound

discretion of the trial court. *Hardy v. United States,* 186 U. S. 224; *Brady v. United States,* 26 F. (2d) 400, 403 (C. C. A. 9, 1928), cert. den. 278 U. S. 621; *Crono v. United States,* 59 F. (2d) 339, 341 (C. C. A. 9, 1932). In *Crumpton v. United States,* 138 U. S. 361, one of the cases cited by Appellant, the Supreme Court in sustaining the exercise of the trial court's discretion with respect to the granting of a continuance goes on to say that (p. 365):

> "It is clear that the ruling of the court is not subject to review."

The Record in this case shows no abuse of discretion by the trial court nor any prejudice to Appellant Danziger, or any of the appellants, in the refusal to grant the continuance requested. As a matter of fact the Court below was alert to the possibiltiy of prejudice to the defendants [R. 383-6] and presumably found none for the Record contains no further reference to any such prejudice after the commencement of the trial. If Appellant or his counsel had any occasion to accept the invitation of the trial court to grant a continuance so that depositions could be taken prior to the resting of their case, they gave no indication of it to the trial judge. A claim made now on appeal that there was prejudice in this regard is empty of any force whatsoever when the Record of the trial discloses that the trial judge had indicated a willingness to consider the matter of a continuance of proceedings after the trial had progressed. This Appellant did not ask the trial judge to do so and is, therefore, without standing to ask this Court to hold that the trial judge committed error for the trial judge was not granted an opportunity to act upon a request for further continuance.

Even if Appellant were in a position to claim that witnesses residing in distant places involved in the war could exonerate him, it is difficult to see that said witnesses were in a position to assist him as to certain of the counts upon which he has been convicted. The conspiracy and scheme to defraud and evidence in support of the individual counts is set forth in detail commencing at page 10 of Appellee's Amended and Supplemental Brief. It will, therefore, not be repeated here. It should be noted, however, that the fraud pleaded and proved as to certain of the counts was encompassed within a very narrow transaction which did not involve any of the Appellant's activities abroad or the corporate defendants' activities abroad. Count 2 concerns a fraud practiced upon a Mrs. Lawyer. Appellant's co-defendant Carter (Warren) called upon Mrs. Lawyer and told her that he represented a Canadian concern which would like to buy her Trinidad International Petroleum notes. He represented that it was his understanding that she had acquired such notes in exchange for certain stock which she had held in the Golden Quebec Mines Company. He represented further that inasmuch as his conversation with her disclosed that she had not exchanged her Golden Quebec stock for Trinidad stock, that if she would do so he, as a representative of certain Canadian interests, would buy the Trinidad stock from her. He told her that if she had not made the transfer and was not in a position to sell Trinidad stock to him, that she should write to defendant Wake Development Company. Thereafter he made follow-up telephone calls to said victim. He wrote to the Wake Development Company, which all of the evidence has shown was operated under the direct supervision of Appellant and was so closely controlled by him that

within its small office a letter to that corporation was in effect a letter to Appellant. He advised Wake about Mrs. Lawyer. He even wrote directly to Appellant Danziger and made suggestions to him as to how to deal with Mrs. Lawyer. Danziger accepted his suggestions and embodied them in a letter. The count is one wherein a victim was induced to buy stock in reliance upon a fraudulent offer to purchase it from her. This type of fraud is also involved in Counts 3, 4, 5 and 6. The evidence thereon is digested in Appellee's Amended and Supplemental Brief. Whether the transactions referred to in said counts occurred or did not occur, was a matter for the Court to determine upon the comparative credibility of the co-defendant Carter (Warren) and Appellant, aided by the documentary evidence submitted in corroboration of Carter's testimony. Whether the defendant corporations were or were not engaged in drilling oil wells in Trinidad had no bearing upon what happened in Yonkers, New York, where the victim Lawyer resided, and Los Angeles, California, from where Appellant Danziger mailed fraudulent letters to her. The sentences upon the counts involving the fraud of the type immediately above related were all made to run concurrent with the sentences imposed upon fraud of the broader type involving the machinations of the corporate defendants and Appellant in a larger field. Appellant in his Petition for Rehearing does not refer to any representation ever made to the trial court which indicated the existence of witnesess who would rebut the evidence offered in support of fraud perpetrated wholly within the United States concerning not the stability of the corporations but based upon a false representation to persons that if they would but acquire the stock, it would be immediately repurchased from them at a profit to them.

II.

Appellant Is Not Entitled to Challenge the Action of the Grand Jury in Indicting Him.

Appellant now, for the first time, in his Supplement to Petition for Rehearing filed after the Petition for Rehearing itself, attempts to impeach the action of the Grand Jury in returning an indictment against him upon an allegation that women were not included in the panel of the grand jurors at the time the indictment was returned and that they were intentionally and systematically excluded. Such an attack made for the first time in a supplement to a petition for rehearing comes too late.

The only attacks made upon the indictment in the District Court were the lame attack heretofore treated, *i. e.,* that the indictment was returned upon hearsay and [R. 140] in the motion in arrest of judgment wherein the form of the indictment and a plea of the statute of limitations were relied upon and in the "Motion to Dismiss Indictment for Want of Prosecution, etc." [R. 68]. The motion, although labeled as above indicated, does use the words "should be quashed" but relates them entirely to the claim that the quashal should be upon the ground of want of prosecution. There is no reference to the Grand Jury in the motion or the affidavit in support thereof. If during the time this case was before the District Court, Appellant had any dissatisfaction with the manner in which the Grand Jury had been drawn, he kept it to himself. He did not raise it by motion to quash, by plea in abatement, by oral comment to the Court, or a motion in arrest of

judgment. Section 556(a) of Title 18, United States Code, clearly specifies the time at which a defendant shall assert any dissatisfaction which he has in the matter of the impaneling of the Grand Jury:

> "No plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the grand jury or upon the ground of disqualification of a grand juror shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant filing such plea or motion is presented for arraignment; and from the time such plea or motion is filed and until the termination of the first term of said court beginning subsequent to the final judgment on such plea or motion and during which a grand jury thereof shall be in session, no statute of limitations shall operate to bar another indictment of any defendant filing such plea or motion, or of any other defendant or defendants included in the indictment to which such plea or motion is directed, for the offense or offenses therein charged. (Apr. 30, 1934, c. 170, Sec. 1, 48 Stat. 648.)"

This statute is the embodiment of the common law rule enunciated in *United States v. Gale* (1883), 109 U. S. 65, 67-70. The effect of said statute has been modified slightly by Rule 12(b)(3) of the New Federal Rules of Criminal Procedure. However, said rules were not in effect during any of the time that this case was before

the District Court and a modification made in said rules would not assist this Appellant for they simply provide:

> "Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."

Even under the New Federal Rules of Criminal Procedure it cannot be fairly contended that the raising of this issue for the first time in an amendment to a petition for rehearing is a reasonable time within which to assert a grievance of this kind. The case of *Ballard v. United States*, 329 U. S. 187, does not assist Appellant. In approaching the question in that case the Supreme Court stated:

> "* * * This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel. Both motions were denied and their denial was assigned as error on appeal. The jury question has been in issue at each stage of the proceedings, except the first time that the case was before us. At that time the point was not assigned or argued. But the case was here at the instance of the United States, not at the instance of the present petitioners. As we have said, there were other issues in the case obscured by the question brought here by the United States and which had not been passed upon below or argued before this Court. Consequently, when we remanded the case for consideration of the remaining issues by

the Circuit Court of Appeals, the jury issue was argued. The Circuit Court of Appeals did not hold that it had been waived. That court passed upon the issue concluding that there was no error in the exclusion of women from the panel. 152 F. 2d, p. 944, and see dissent at p. 953. Under these circumstances we cannot say (and the Government does not suggest) that petitioners have lost the right to urge the question here. * * *"

See, also:

Redman v. Squire (C. C. A. 9, May 16, 1947).

Respectfully submitted,

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